No. 2470

United States
Circuit Court of Appeals
For the Ninth Circuit

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a corporation,
Plaintiff in Error,

v.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Plaintiff in Error

Upon Writ of Error to the United States District Court, for the District of Washington, Northern Division.

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Names and Addresses of Attorneys of Record:

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For Defendant in Error.

STATEMENT OF THE CASE

This action was instituted by the United States of America against the Oregon-Washington Railroad & Navigation Company to recover ten penalties authorized by the Act of Congress, known as "An Act to promote the safety of employees and

travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (34 Stat. 1415).

The complaint contained ten causes of action, alleging over-service of one M. W. Longabaugh, occurring respectively on April 21 to April 30, 1913, inclusive, in which it is claimed that the plaintiff in error required and permitted Mr. Longabaugh to be and remain on duty as a telegraph operator and employee from the hour of 7 o'clock in the morning to the hour of 12 o'clock midnight of those respective and several days.

The length of service of Mr. Longabaugh upon the dates alleged was admitted, and a further defense set up (Trans., folio 14), in which it was claimed that during the dates from April 21 to April 30, 1913, both dates inclusive, it became necessary for the plaintiff in error for good cause, to discharge one of its telegraph operators and employees. This left only two operators at the station of Wallula for the performance of telegraphing service. The plaintiff in error inquired at various places likely to enable it to obtain an additional operator, namely, at Portland, Oregon, The Dalles, Pendleton and La Grande, Oregon, Walla Walla and Spokane, Washington, and elsewhere, but was unable to secure the services of an operator during said time, and thereupon did direct the said M. W. Longabaugh to work three

hours as a station agent and six hours as a telegraph operator, making a total period of nine hours in each 24-hour period; but that the said M. W. Longabaugh, without the knowledge of the plaintiff in error, or any of its officers or agents and against its will and consent, did erroneously construe said directions as to his work, and did work twelve hours as a station agent and six hours as an operator in each 24-hour period, and did so continue to work from the 21st day of April, 1913, to the 30th day of April, 1913, at which time the fact of the service of the said Longabaugh was discovered by and became known to the plaintiff in error, at which time the said work of said said Longabaugh immediately ceased, and was discontinued by the direct action of the plaintiff in error and its officers and agents.

These facts were not denied by the Government, but in addition thereto a stipulation was signed by the Government's and carrier's attorneys, confirming the jurisdiction of the court, the corporate and interstate character of the business of the plaintiff in error, the character of the work performed by Mr. Longabaugh; and that before he performed any over-service he was instructed by his superior officers and agents not to work in excess of nine hours in any 24-hour period, either as an agent or operator or in both capacities, and that whatever over-service Longabaugh performed, was in violation of his instructions and without

the actual knowledge of the superior officers of said Longabaugh.

A jury was waived (folio 18), and the cause submitted to the court for trial. The plaintiff in error petitioned and moved the court that judgment be entered in its favor upon the ground and for the reason that upon the admitted and stipulated facts in the case, no violation of law upon which the cause of action herein based, has been established, but to the contrary the Government has failed to make out or establish its cause of action upon any count alleged. This petition and motion was denied, to which the plaintiff in error requested and was allowed an exception.

The court thereupon entered a judgment in favor of the Government in the sum of One Hundred Dollars for each count set forth in the complaint, aggregating One Thousand Dollars, together with costs and disbursements of the action (folio 29).

SPECIFICATIONS OF ERROR

The lower court erred in overruling and denying the motion of plaintiff in error for judgment in its favor, upon the admitted and stipulated facts in the case, which motion was made at the close of the trial, and upon the ground that no violation of law had been established, but that the Government failed to make out or establish its cause of action upon any count alleged, and also that the

lower court erred in entering a judgment in favor of the Government and against the plaintiff in error. (Folio 33.)

POINTS AND AUTHORITIES

1. It was not the intention of Congress, in the enactment of the Hours of Service Act, that the carrier shall be deemed to have knowledge of the acts of its employees.

Sections 1 and 3, Hours of Service Act.

2. To "require and permit" the performance of any act, there must be shown to be knowledge on the part of the person charged with having required or permitted the act.

Gregory v. U. S., 10 Fed. Cases 1195, 1197.
City of Chicago v. Stearns, 105 Ill. 554, 558.
Wilson v. State, 46 N. E. 1050, 1051.

3. To "permit" an act, one must expressly authorize the act, or having knowledge thereof, acquiesce in its continuance.

Bd. of Education v. Bd. of Education, 3 Ohio Dec. 70, 71.
Coon v. Froment, 49 N. Y. S. 305.
State v. Abrahams, 6 Iowa 117.
City of Chicago v. Stearns, 105 Ill. 554.
State v. Robinson, 55 Minn. 169, 171.

4. A statute which deprives a party of his opportunity of presenting his side of the case, or defense, is unconstitutional.

State v. Donato, 53 So. 662.
Banks v. State, 2 L. R. A. (N. S.) 1007.
State v. Beach, 36 L. R. A. 179.
Luria v. U. S., 231 U. S. 9.

5. A statute making a rule of evidence conclusive is unconstitutional in that it deprives one against whom the rule works of the due process of law, contrary to the fifth amendment of the Constitution of the United States.

State v. Griffin, 70 S. E. 292.
M. J. & K. Co. v. Turnipseed, 219 U. S. 35.
Bailey v. State of Alabama, 219 U. S. 219.
M. K. & T. v. Simonson, 57 L. R. A. 765.

6. In establishing a rule of evidence there must be a rational and logical connection between fact proved and fact presumed.

Opinion of Justices, 34 L. R. A. (N. S.) 771.
State v. Griffin, 70 S. E. 292.
M. J. & K. Co. v. Turnipseed, 219 U. S. 219.

7. The common law did not impute to the corporation the knowledge of all its officers and agents, but only when the knowledge was gained while acting for the corporation within the scope of their authority or with reference to the particular transaction.

2 Thompson Corp., Sec. 1646, 1649.
The Distilled Spirits, 11 Wall. (U. S.) 336, 356.
Rogers v. Palmer, 102 U. S. 263, 268.
Denver v. Sherret, 88 Fed. 226, 234.
Curtice v. Crawford Co., 118 Fed. 390, 394.

ARGUMENT

The sole question for consideration in this case is:

1. Whether or not the knowledge of the employee, Longabaugh, whose conduct was claimed to be or consisted in the violation of the Hours of Service Act, is the knowledge of the company where it appears as an undisputed fact that no officer or agent superior to this employee knew of his over-service, or in any sense knowingly required or permitted the excess service.

2. As a part of the above question, where an employee is instructed to work certain hours not amounting to excess or over-service, does a want of actual knowledge of said employee's over-service on the part of his superior officers or agents of the carrier constitute a defense?

Every fact necessary to raise these questions has been either admitted or stipulated. It will be conceded that the plaintiff in error did not **require** Longabaugh to be or remain on duty in excess of the period prescribed by the Hours of Service Act, but it is contended that the carrier did **permit** the over-service.

The word "permit" by the Century dictionary means:

"To suffer or allow to be, come to pass, or take place, by tacit consent or by not prohibiting or

hindering; allow without expressly authorizing; to grant leave or liberty to by express consent; allow expressly, give leave, liberty or license to."

The word "permit" in the Hours of Service Act implies affirmative action; that is, the carrier must affirmatively authorize or allow the employee to remain on duty for a longer period than that specified in the act or fail to prevent the over-service having knowledge of its rendition. It is conceded in this case that the carrier was not guilty of any affirmative action with respect to the over-service; but inasmuch as the over-service was rendered, it is contended that the carrier failed to prevent it having knowledge of its rendition. To charge the carrier with knowledge, it is urged that Longabaugh, the violator, knew of his violation; that no one else connected with the carrier knew it, particularly no superior officer. That Longabaugh's knowledge is the company's knowledge by virtue of the statute.

These views are denied by the carrier. The reasons in support of this denial are in part the following:

In the case of

> Board of Education v. Board of Education, 3 Ohio Dec. 70, 71,

the word "permit" was defined as follows:

"Permit is defined: to grant permission, to give leave, to grant express license or liberty to."

And in

McHenry v. Winston, 105 Ky. 307; 49 S. W. 4,

it was held:

"The word 'permit' when used as an infinitive, is defined as meaning to allow, or giving leave, as in the familiar quotation, 'Thou art permitted to speak for thyself.'"

Reference is made to the case of

Coon v. Froment, 49 N. Y. Supp. 305,

where it was held that by use of the word "permit" affirmative action is implied.

The Supreme Court of Iowa in the case of

State v. Abrahams, 6 Iowa 117,

said:

"Mere inactivity on the part of a landlord, or his failure to take some steps to prevent an illegal use of the premises by the tenant, is not permitting him so to do, in the sense contemplated by the statute, making it criminal for a landlord to permit such a use of the premises. An affirmative assent is necessary, and if the landlord by any act or declaration affirmatively assents to the premises being so used, after he has knowledge of the purpose for which they are used, he is guilty. To make him liable there must be a consent to such use, either expressly given or by his acquiescence. A mere failure to interfere, or to prosecute or to prevent the illegal use, cannot be construed to amount to a permission or a silent affirmative acquiescence in such use."

A rational construction of the Hours of Service Act in its application to cases where the affirmative action of the carrier is absent like the case at bar, contemplates the presence of knowledge on the part of the carrier before the violation is attendant with liability. If this were not true, Congress would not have said in section 3 of the Hours of Service Act:

"In all prosecutions under this act the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents."

The lower court held this provision to eliminate all questions of knowledge or criminal intent. (See opinion, folio 22.) We submit the learned court is in error in this respect. It does not eliminate the necessity of knowledge, on the part of the carrier, but it supplies the proof of it and defines the kind of knowledge and the class of servants possessing the knowledge that shall bind the carrier and fix the liability for the employee's conduct.

It may be contended that the word "permit" as used in the Hours of Service Act should be construed to mean "allow" or "suffer." Such contention is unsound.

Webster, in referring to the words "permit," "allow" and "suffer," says:

"Permit is the most positive, denoting a decided assent."

City of Chicago v. Sterns, 105 Ill. 554, 558.

"As distinguished from 'allow' or 'suffer,' 'permit' is more positive, denoting a decided assent, either directly or by implication. 'Allow' is more negative, and denotes only acquiescence or an abstinence from prevention. 'Suffer' is used when our feelings are adverse, but we do not think best to resist."

Board of Education v. Board of Education, 3 Ohio Dec. 70, 71.

"'Permit' as used in Acts 15th Gen. Assem. C 59 No. 1, making it unlawful for the keepers of a billiard saloon to permit a minor to remain in the saloon, implies express assent or license to do an act or the failure to prohibit it. If it is the duty of one to prohibit an act, and he fails to do so or to use efforts to do so, he permits the act which he could have prevented."

State v. Probasco, 62 Iowa 400; 17 N. W. 607.

"The word 'permit' is more positive than the word 'allow' or 'suffer,' denoting a decided assent, either definition of the work, including knowledge of what is to be done under the permission, and intention that what is done is what is to be done; and hence entry of a saloon by a bartender at a time when the sale of liquor is forbidden without the proprietor's knowledge, and against his orders, does not render the proprietor liable, under Acts 1895, p. 248 No. 3, forbidding him to permit any person except members of his family to enter at such times."

Wilson v. State, 46 N. E. 1050, 1051.

The words "allow" or "suffer" do not find a place in the statute. By using the word "permit" in the Hours of Service Act the Congress used the most positive of the words synonomous therewith, and undoubtedly calculated that there should be present a decided assent to the over-service before denouncing the carrier for a penalty.

So the element of knowledge is absolutely necessary.

Gregory v. U. S., 10 Fed. Cas. 1195-1197.

Wilson v. State, 46 N. E. 1050, 1051.

City of Chicago v. Sterns, 105 Ill. 554, 558.

The Act under consideration provides:

"That it shall be unlawful for any **common carrier, its officers or agents,** subject to this Act, to require or permit any employee subject to this Act to be or remain on duty for a longer period than . . . . nine hours."

ALL KNOWLEDGE POSSESSED BY OFFICERS OR AGENTS NOT IMPUTED TO CORPORATION AT COMMON LAW.

At common law the rule broadly stated as to charging corporations with the knowledge of their officers and agents is that notice communicated to, or knowledge acquired by, the officers or agents of corporations, **when acting in their official capacity**

or within the scope of their agency, becomes notice to or the knowledge of the corporation and is binding upon it.

2 Thompson Corp. Sec. 1646.

And even this rule has its limitations, but it is never extended and the cases are practically agreed that the corporation will not be bound by notice to any officer or agent unless the knowledge is acquired or notice given, while he is acting for the corporation generally or with reference to the particular transaction.

2 Thompson Corp. Sec. 1649.
The Distilled Spirits, 11 Wallace (U. S.) 336, 356.
Rogers v. Palmer, 102 U. S. 263, 268.
Denver v. Sherret, 88 Fed. 226, 234.
Curtice v. Crawford Co. Bank, 118 Fed. 390, 394.

The meaning of this rule is, that notice to or knowledge gained by an agent while acting for himself, or while acting for some one other than his principal, or while not acting in any matter of business, but pursuing his mere pleasure on the street or at his private residence, will not be notice to his principal; because, under such circumstances, the law will not indulge the presumption that he remembers it and communicates it.

2 Thompson, Sec. 1649.

The above stated rule is so faithfully supported by the cases cited by the learned author as to need only reference thereto for additional authority.

Now, the lower court, we think, misconceived the limitations and distinctions made by the common law, in its opinion (folio 22), wherein the following language was used:

"The knowledge of such general officers or agents is imputed to the company by the common law and it is very apparent that the statute in question is not merely declaratory of the common law."

We do not object to the view that the statute is not merely declaratory of the common law, but we do object, with all due respect to the opinion of the learned judge, to the holding that "the knowledge of the general officers and agents is imputed to the company" under all circumstances without regard to how the knowledge was obtained.

Such holding overlooks the fact that knowledge by an officer or agent gained while acting for himself or for some one other than his principal or while not acting in any matter of the carrier's business but pursuing his mere pleasure, does not bind and is not imputed to the company at common law.

The reasoning of the learned judge is based upon the premise that the statute included something more than the common law, and that therefore it must include Longabaugh's knowledge as binding on the company.

The fault of the reasoning lies in the view of the extent the common law held an agent's knowledge binding.

Now, while we agree that the statute was intended to extend the common law, but we think it merely abolished the exceptions and limitations of the common law rule, so that the knowledge of the carrier's officials or agents, no matter how obtained, shall be imputed to the company; i. e. whether the knowledge was acquired casually, or while on mere pleasure bent and outside the scope of the officers or agents authority or employment, it is to be deemed the carrier's knowledge. But in a case like that at bar, where there was admittedly no knowledge, it is submitted there is none to be imputed.

Congress might have penalized the carrier every time an employee worked over-hours, as it did when a car lacked the U. S. standard safety appliances. But it certainly did not. It only penalized the party (officer or agent) and his carrier, for **requiring** or **permitting** the over-service.

To penalize for mere over-service would require very different kind of language from that used in the act, yet the Government's contention would read such differently required language into the act, and mere over-service was all the Government proved by which to claim a conviction. Such proof, we submit, falls far short of that necessary.

Suppose the Government desired to prosecute one of Longabaugh's superiors for a violation of

the Hours of Service Act, would proof of mere over-service be sufficient? Obviously not. We submit that in a given case the same quantum of proof required to convict the superior officer (officer or agent) is necessary before a conviction of the carrier can be claimed. For when it is shown by proof that the official or agent knew of the over-service and failed to prevent or stop it, then the statute imputes that knowledge to the carrier. A case which binds one, convicts the other.

This statute does not denounce the voluntary service of an employee of a railroad company, but if there shall be voluntary service on the part of the employee, plus knowledge of an officer or agent, the carrier is bound. If there was any doubt about the binding force of knowledge of an officer or agent of the carrier prior to the passage of the act, there can be none now, for the act provides that the carrier "shall be deemed to have the knowledge of all acts of all its officers and agents."

It is earnestly submitted to the court that there is no statute which declares the knowledge of the culprit to be the knowledge of the carrier, assuming the acts of Longabaugh in rendering over-service was culpable. It is the knowledge of that man in the company's employ who either directed him to render over-service, or knowingly failed to prevent him from so doing, that binds the company.

The plaintiff in error was confronted with this situation. For good cause it became necessary to discharge one of the operators at the station of

Wallula, Washington. It was a station operated continuously night and day within the meaning of the Hours of Service Act. Only two operators remained. An extraordinary effort to supply the deficiency by inquiring in Spokane and Portland, the termini of the railroad, and at The Dalles, La Grande and Baker and intermediate stations, to secure the services of another operator, but without success. And so the carrier, acting through its officers and agents, **being the same class of officers and agents upon whom the prohibition of requiring or permitting over-service was imposed,** directed Mr. Longabaugh to work nine hours at Wallula; six hours of which service was at the telegraph key and three hours other service. Mr. Longabaugh voluntarily and without actual knowledge of these **officers and agents, upon whom the prohibition of the statute rested,** voluntarily worked six hours as an operator and twelve hours otherwise, and when this voluntary service was discovered by or became known to the aforesaid officers and agents, the work of Longabaugh immediately ceased and was caused to be discontinued by the direct action of the carrier and its officers and agents. There could be no affirmative assent to this over-service under these facts.

Was there acquiescence in the performance of the excess service? Did the carrier and its officers and agents whose acts, in requiring and permitting the employee to render over-service, are made un-

lawful, have anything to do with Longabaugh's conduct? If they knew it, they did, but the Government agrees and admits that they did not know it. Therefore, the answer to the question is, that they did not have anything to do with the overservice. That they did not require or permit it. They did not affirmatively or actively authorize it, nor did they passively suffer, acquiescence, allow, tolerate or permit it; not for one moment.

The Hours of Service Act divides the servants of a railroad into two classes: (a) The officers and agents; (b) The employees. The Congress defined the term "employee" but did not define the terms "officers and agents," but a rational construction of the act would limit the meaning of the words "officers and agents" to that class of the carrier's servants having the right to direct the service of an "employee," for the act says:

"Section 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employee subject to this act, to be or remain on duty for a longer period than . . . . nine hours."

Here the Congress was referring to that class of the company's servants having the right to control the work of another servant, and proposed that the knowledge of the acts of said officer or agent having such control should bind the carrier; for it was further stated in the act:

"The common carrier shall be deemed to have had knowledge of all acts of all its officers and agents."

Now, the carrier could not act except through a servant. The limitation of unlawfulness is placed upon only those servants of the common carrier having the right to direct the employment of others, namely, its officers and agents. Obviously, therefore, the Congress meant that if such **officer or agent** performed any act by their direction of the service of another, then the carrier shall be deemed to have had knowledge of such acts, because, and for that reason only, the Congress intended to make the act of such officer and agent unlawful and not the mere act of the employee in performing the over-service.

Now, the Congress did define the term "employee." We quote from section 1:

"And the term 'employee' as used in this act shall be held to mean persons actually engaged in or connected with the movement of any train."

An operator is an employee within this definition. It is suggested that in a proper case a penalty is recoverable alike against the carrier or its officers and agents; if these particular officers and agents thus chargable were the officers and agents requiring or permitting the over-service; but it is also very clear that this penalty recoverable against the carrier, its officers and agents cannot be recov-

ered against the employee performing the over-service.

Congress might have enacted legislation penalizing the employee performing the over-service, but it did not. The employee was omitted doubtless from the fact that mere over-service was not regarded as necessary to come within the prohibition of the statute.

It was the requiring, the permitting of this over-service by some other person, namely, an officer or agent of the carrier, that was to be denounced by the statute as unlawful.

We submit, therefore, that it was the knowledge of this third person in a capacity of an "officer or agent" and not in the capacity of an "employee" performing the over-service which was to carry with it binding force upon the carrier.

The Hours of Service Act is penal in character, and while it should be construed as remedial acts are construed so as to accomplish the objects and purposes of the Congress, yet it is also to be construed strictly in that it shall not be made by construction to include acts beyond the purview of the meaning of the statute and beyond the intention of the Congress.

It would have been very easy to include a provision in the Hours of Service Act making the knowledge of the employee performing over-service, the knowledge of the carrier, but Congress did not

see fit to do so, and surely we cannot read into a statute a word, a sentence or a meaning not covered by the statute. The words of the statute were selected with care and the binding knowledge defined therein is limited to that possessed by the officers and agents, and the knowledge of the employee performing the over-service is omitted therefrom.

The lower court, we feel, misunderstood our contention in having stated that the carrier contended that the expression "all its officers and agents be limited to general officers and agents."

We merely contend and in this we insist that we are supported by the proper construction of the act itself as well as good reason and logic, that the carrier is not to be bound under this statute by the knowledge that the employee performing the over-service has or should have that he is violating the law. The only knowledge shown in this case of the over-service at the time of its rendition is the knowledge possessed by Longabaugh, and we contend that Longabaugh's knowledge is not the carrier's knowledge. We insist that the Government must show that some other person who has the right to direct this employee's service, whether it be a general officer or agent or any other person of lesser authority, had knowledge of the over-service before a conviction can be claimed. It is the knowledge of the acts of this latter official,

agent or person that the statute declares shall be deemed to be the knowledge of the carrier.

A construction of the Hours of Service Act which makes the knowledge of the employee performing over-service the knowledge of the carrier, is tantamount to a conclusive presumption of the knowledge on the part of the carrier of the unlawful and prohibited acts of the employee. A statute so prohibiting is unconstitutional in that it deprives a carrier of the due process of law. It deprives the carrier of the right to defend. Such construction would obviously impute to the carrier something which it had not, and which it could not by any means place itself in a position of obtaining unless it employ men to constantly watch each employee. If the Hours of Service Act is to be construed that the carrier is deemed to have the knowledge of the guilty party, the knowledge of the culprit, then the door would be opened to the systematic penalization of the carrier by the unauthorized and voluntary performance of over-service. The only thing that would protect the carrier would be the conscience of the Government in declining to prosecute such carrier.

It is a fundamental rule of law, too well established to admit of contravention, that the legislature may, generally speaking, prescribe rules of evidence, but a chance, if, indeed, it be a fighting chance must be left the party to make his defense.

Quoting from the opinion of the court in the case of

State v. Beach, 36 L. R. A. 179, 182,

it was said:

"A law which would, in effect, exclude the evidence of a party, and thereby deny him the right to be heard, would deprive him of due process of law."

While the Legislature may say that evidence of certain facts shall be prima facie evidence of guilt or of the existence of other facts, but the right to rebut this prima facie case is not to be denied the party against whom the evidence is offered.

The Senate of the Commonwealth of Massachusetts obtained an opinion of the justices of the Massachusetts Supreme Judicial Court, relating to the constitutionality of an act to constitute eight hours a day's work for public employees.

208 Mass. 619; 34 L. R. A. 771.

Section 5 of the act, concerning which their opinion was desired, provided that the mere fact of over-service "shall be prima facie evidence of the violation of the provisions of this act." There were circumstances under the act in which more than eight hours' work could be performed, and it was not true that in all cases that more than eight hours' work was prohibited.

The justices said:

"We are of the opinion that the Legislature has no constitutional authority to punish any citizen merely upon evidence of the existence of a fact which in ordinary cases has no tendency to establish guilt."

We contend that the mere fact of over-service has absolutely no tendency to establish that the carrier **required or permitted** the employee so to work.

In the case of

Goldstein v. Maloney, 57 So. 342,

the court said:

"It is competent for the Legislature to create by law prima facie presumptions of evidence without denying the process of law where such presumptions may be a natural or reasonable inference from the facts or circumstances from which the presumptions are raised by the statute, and the opposite party is not deprived of the right to rebut the presumptions in some fair manner duly provided or accorded by the rules of law or procedure."

While the fact of over-service is necessary to be proven before a conviction can be obtained, yet if the construction contended for by the Government be the correct one, all that would be required to prove is the fact of over-service. We contend that such legislation is not a competent exercise of Congressional power and contravenes the fifth amendment to the United States Constitution.

See also in this connection:

Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61.

Mobile etc. Ry. Co. v. Turnipseed, 219 U. S. 35.

Mr. Justice Lurton, speaking for the court in the latter case, said:

"It is essential that there shall be some rational connection between the fact proved, and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be purely arbitrary mandate."

If voluntary over-service by an employee or prohibitive service by an employee is all that is necessary for the Government to prove to sustain a conviction under the Hours of Service Act, then it must follow that from this fact of over-service the statute presumes knowledge on the part of the carrier's officers and agents, and this knowledge is imputed to the carrier, and then the statute presumes that the carrier required or permitted the unlawful act, and from these facts a conclusion of guilt arises. Such construction presumes the statute in question shall supply by arbitrary mandate the facts necessary to establish guilt in addition to the mere performance of over-service.

In the case of

State v. Beach, 36 L. R. A. 179,

it was said:

"A law which provides that certain facts are conclusive proof of guilt would be unconstitutional as also would one which makes an act prima facie evidence of crime which has no relation to criminal act."

In the instant case no person had knowledge of the over-service, the scope of whose authority included the power to prevent it, and the carrier could take no additional means than that which it did take to relieve itself of acts denounced by the statute.

It is absolutely impossible for the carrier's officers and agents to be at all times present to keep a check upon the employees, and the best that can be done is to fix the limits of the service, insist upon compliance and discharge the employee for a violation.

The lower court held that the statute declared the knowledge with carrier's officers and agents to be the knowledge of the carrier, including Longabaugh's knowledge of his own unlawful acts. The case differs from the violations of the Safety Appliance Act.

It has been held that want of knowledge of defects in safety appliances was no defense, for the very simple reason that the carrier, or some one in its employ, was charged by statute with the duty

of equipping cars with automatic coupling grab-irons and other safety devices; that it would be a violation of this duty not to do so, but if we could for the moment assume that automatic coupling grab-irons or other safety devices had life and human activity and the power to voluntarily do a prohibitive act, as Longabaugh had, then an entirely different situation would appear. The voluntary act of the humanized automatic coupler and the like, would not be the act of the carrier. We see no analogy between the safety appliances cases and those arising under the Hours of Service Act.

The question is squarely before the court as to whether or not Longabaugh's knowledge of his own unlawful act, which obviously he must always have, is the knowledge of an officer or agent. If it is, then Longabaugh must be an officer or an agent, and if so, he must be in the class of officials and agents that would subject themselves by requiring or permitting over-service to the same penalties, obligations and responsibilities that the carrier is subject to if the Government should chose to protect him.

Now, it would not be contended that he, Longabaugh, was such person. It was not intended by Congress that the man performing the over-service was to be punished, and if he is in that class he cannot be in the other class, and consequently his knowledge is not the knowledge of the carrier.

For these reasons, we submit that the judgment of the lower court should be reversed with directions to dismiss the complaint.

Respectfully submitted,

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